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No. 07-1124

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In The Supreme Court of the United States

GILBERT GREEN and CALVIN JONES, Jr.

Petitioners,

v.

JOHN DILLARD,

v.

CHILTON COUNTY COMMISSION, ROBERT M. MARTIN, PROBATE JUDGE

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals For the Eleventh Circuit

REPLY BRIEF

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REPLY

Petitioners Green and Jones (collectively "Petitioners") respectfully submit their reply to Respondents' Brief in Opposition to the Petition for Writ of Certiorari ("BIO").

I. Despite Respondents' Recent Deletion of the 1988 Decree's Racial Classification, the Petition is Not Moot.

The questions presented in the Petition remain properly before this Court. Respondents are required to establish that the "allegedly wrongful behavior could not reasonably be expected to recur." *Adarand Constructors, Inc. v. Slater*, 528 U.S. 216, 222 (2000). Their last minute revision of the 1988 Decree fails to carry this burden. The Eleventh Circuit order reinstating the 1988 decree remains in place. There is no concession from Respondents that the reinstatement is erroneous. Under similar circumstances, this Court declined to find a case moot. *See Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561, 568-69 (1984) (court-ordered race-based layoffs halted pending appeal). Finally, because this Petition concerns voting in a "covered" jurisdiction, the challenged racial provision remains in effect until approval is given under § 5 of the Voting Rights Act.

A. Respondents' Fall Short of Proving Mootness.

"[A] defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice." *Northeastern Florida Chapter v. City of Jacksonville*, 508 U.S. 656, 661-62 (1993); *see also Parents Involved in Cmty. Schools v. Seattle Sch. Dist. No. 1*, 127 S.Ct. 2738, 2751 (2007). Given the history of this case, neither the fact that the Respondents voluntarily caused the provision to be removed from the consent decree, nor their statement that it does not intend to resuscitate such language, satisfies their "heavy burden" of proving that it is "absolutely clear" that the conduct will not recur. *See Friends of Earth, Inc. v. Laidlaw Envtl. Serv. (TOC), Inc.*, 528 U.S. 167, 189 (2000).

Respondents provide two arguments in support of their position that the offending behavior is unlikely to recur. First, Respondents state the provision was removed from the consent decree by operation of court order. BIO at 11. Second, respondents state, without proof, that the consent decree at issue is a "one-of-a-kind decree" and that Alabama law does not authorize taking race into account in the selection of a public official. BIO at 11-12. In light of the history of this case, these arguments are wholly unpersuasive.

Respondents moved the District Court to remove the racial quota from the 1988 decree only after the filing of this Petition. Prior to the threat of this Court's intervention, Respondents vigorously

defended the requirement of a racial quota; yet they now adopt a posture that removal of the quota was completely voluntary. Petitioners respectfully request this Court weigh such a convenient confession against the twenty years of a pattern and practice, which necessitated the litigation that brings this question to bar.

In fact, Respondents insisted during the course of the case that there was no need for removal of the provision. *See* App. 55a at ¶ 8 ("the remedies agreed to in the 1988 Chilton County Commission consent decree . . . further the objectives of the Voting Rights Act and the Fourteenth and Fifteenth Amendments"), App. 56a at ¶ 10 ("the failure or refusal of the Chilton County Commission and the Alabama legislature to adopt the 1988 consent decree in state law is tainted with racially discriminatory intent"), and App. 56a at ¶ 14 ("the 1988 consent decree plan provides black citizens in Chilton County an equal opportunity to participate in the political process . . ."). In the district court, Respondent Chilton County admitted that the provision was illegal, but refused to take action to change the 1988 decree. App. 66a-67a; 91a, 76a (admitting allegation that ¶ 4 violates the Fifth Amendment and the Fourteenth Amendment).

Moreover, on appeal from the decision of the district court to vacate the decree, either Respondent could have easily excepted the chair selection provision and allowed the order to vacate the provision to stand. Instead, Dillard defended it and Chilton County remained silent. Accordingly, Respondents' argument to the District Court that the provision "was intended as a temporary remedial

measure," app. at 107a, seems self-serving and inaccurate. *See United States v. W.T. Grant & Co.*, 345 U.S. 329, 634 (1953) (failure to terminate the conduct in question until after a suit was filed, despite years of attempts to persuade a party otherwise, as well as the parties' express refusal to concede that the actions at issue were illegal, may be persuasive proof that the conduct is likely to recur).

Respondents next contend that because "no provision in Alabama law [. . .] would authorize taking race into account in selecting the chair of a county commission, there is no possibility that such a provision will be reinstated." BIO at 11-12. This argument quite simply ignores the fact that there was no such statute in place preceding their implementation and defense of such a practice. Nevertheless, for the past twenty years Chilton County voters have been subjected to a voluntary agreement between the Respondents that required race be considered in the selection of the commission chair, and denied them their right to vote for that position. This agreement was blessed and enforceable by the contempt power of a federal district court in the name of the Voting Rights Act.

Petitioners also reject Respondents argument that the new State statutes operate as Respondents contend. *See* BIO at 11-12,18-19. Act No. 2006-252 is codified at Ala. Code § 11-80-12. It says explicitly that "where a federal court order has overturned the previous order concerning the manner of election and the number of members of a county commission," the section shall not apply. Further, the district court ruled while this Petition was pending, that § 11-80-12 does not incorporate the existing federal court order

for the Chilton County Commission, as the law of the State of Alabama. App. 39a. This interpretation is correct.

In further support of their argument, Respondents cite Act No. 2007-488. This act exempts county commissions, which are governed as "provided by local law, by court order, or governed by Section 11-80-12" from a general requirement for the number of members and their terms of office. This statute cannot moot Petitioner Green's claims because it does not establish which of the different forms of the exemptions controls. Thus, the statute does not determine, as a matter of state law, that a federal court order controls the proper number of members of the county commission.

If Act No. 2007-488 does ratify the 1988 decree, as Respondents claim, then the court-established Chilton County local government embeds into state law the racial classification of the 1988 decree. It is most unlikely that the Alabama legislature meant to confer on courts, much less federal courts, the authority to adjust *prospectively* the make-up of local government. If that did happen here, then there is utterly no assurance that Respondents will not make another deal to impose even wider racial classification in local government.

Finally, Act No. 2007-488, and its application to Chilton County (with or without the deletion of the racial set aside on the chair position) has not been submitted for § 5 approval pursuant to the Voting Rights Act, 42 U.S.C. § 1973c. *See Riley v. Plump*, No. 07- 1460, Juris. Statement at 10 n.7 (May 21, 2008). To the extent it changes State law, this statute cannot

be enforced as state law, until § 5 approval is obtained.

B. The 1988 Decree Has A Collateral, Continuing Effect Under The Voting Rights Act.

The case is not moot for yet another reason. Because the 1988 decree was the product of a local government's policy choice, it serves as a baseline under § 5 of the Voting Rights Act, despite being reflected in a federal court order. *See McDaniel v. Sanchez*, 452 U.S. 130 (1981). The 1988 decree therefore has continuing effect, and future changes in State policy will be measured against that "baseline." *See Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 327-28 (2000).

Thus, the district court order vacating the 1988 decree as illegal under federal law restored the 1951 Act: four commissioners from residency districts, and a probate judge chairman, elected at-large. That structure was in effect on the Voting Rights Act statutory baseline date of November 1964, *see* 42 U.S.C. § 1973c. The district court order also ended the different practice established by Chilton County in 1988, which would be due to be used as a baseline, if the change came at the initiative of the State. *See e.g., Abrams v. Johnson*, 521 U.S. 74, 96-97 (1997).

Respondents' last minute, limited revision of the Eleventh Circuit-restored 1988 decree at the request of Chilton County, requested after review was sought here cannot be administered, until it receives § 5 approval. The claim against the racial quota for the chair position therefore cannot be moot

II. Petitioners Have Standing.

Respondents do not dispute Petitioners' assertion that their exposure to a racial classification confers standing. Pet. at 12. They do not assert that *Lance v. Coffman*, 127 S.Ct. 1194 (2007), applies to the removal of an office from selection by citizen voters. Rather, Respondents imply that "dilution" of the aggregate voting strength of a voter in a racial group is the only basis for distinguishing a voter's standing from a mere generalized grievance of the *Lance* voter. BIO 15 (citing *Baker v. Carr*, 369 U.S. 186, 207-08 (1962).

This case is worthy of this Court's review to explain the difference between those *Lance* case voters, who lacked standing, and those voters in *Baker v. Carr*, and other cases cited, who possess standing. The Eleventh Circuit's discussion of standing sought to treat the claims about the racial set aside as if they involved only the rights of Commission members, or the general citizenry. Pet. App. 19a-20a n.9. Much more is at stake.

As this Court noted in *Bunton v. Patterson*, 393 U.S. 544, 555 (1969), a private party has standing to prevent denial of voting on account of race, including the change of an office from elected to appointed positions. The Eleventh Circuit was wrong to find otherwise.

III. The Eleventh Circuit Was Not Barred By Article III From Affirming the District Court's Decision to End the 1988 Decree.

A. The Conflict with Seventh Circuit Precedent Is Not Avoided By Respondents.

The crux of Respondents' argument is that *ACORN v. Edgar*, 56 F.3d 791 (7th Cir. 1996) is wrongly decided. Their efforts at finely parsed distinctions fail to avoid the essential difference between the Seventh Circuit's decision and the decision here. The Seventh Circuit's conception of appellate court power conflicts with the Eleventh Circuit's, and the respect required by Article III courts for local election structures is much more real than Respondents acknowledge. BIO at 21. The judicial remedy reinstated by the Eleventh Circuit opinion orders not only a racial classification, but also the creation of officials to govern Chilton County– the very equitable remedy condemned for Illinois *sua sponte* by the Seventh Circuit.

In both *ACORN* and the case at bar, the affected government "waived" the relief ultimately issued. *See ACORN*, 56 F.3d at 796-97. Both governments lost on, or admitted, liability in the district court. To be sure, the appeals come to the court via differently-positioned parties, but that does not change the essential point about the appellate court's remedial power. Despite the absence of an explicit request from the affected government, the

Seventh Circuit protected State electoral structures through its supervisory power. The Eleventh Circuit did not.

Respondents attempt to treat the State's appeal of the liability judgment in the *ACORN* case as the "functional" equivalent of a State request for relief. BIO at 22. The invocation of this "functional" approach cuts in Petitioners' favor. In the instant case, the Respondent local government accepted the judgment of the district court in favor of Green, and did not appeal. Consequently, as a "functional matter," Chilton County defended the district court judgment on appeal through Green. Certainly, there was no requirement that it file a brief to receive the benefit of the judgment. *See* Fed. R. App. P., Rule 31(c).

The essential difference between the Eleventh Circuit decision and the *ACORN* case is *not* that there was some Article III controversy properly before the Seventh Circuit about the federal judicial supervision of local election processes. In both cases, there was. This Court should resolve the conflict over whether and how an appellate court should respond to such silence from the local government.

B. The Split in the Circuits on the Rule 60(b) Power of the District Court Is Material.

The Eleventh Circuit decision faces another legal hurdle– its failure to accept the district court's

decision on the alternate ground that Rule 60(b)(5) authorized the district court to grant relief, "without regard for whether the proper parties have requested it." Pet. 23. On that point, there is plainly a split in the circuit courts, as Respondents acknowledge. However, Respondents are wrong in saying the split does not matter here.

First, Respondents incorrectly characterize the question presented for resolving this split in authority as whether "the *Eleventh Circuit* could *sua sponte* vacate the 1988 . . . decree." *See* BIO at 23 (emphasis in original). Petitioners submit that the proper question is whether the Eleventh Circuit should have allowed the district court order vacating the 1988 decree to remain in place. That would be an alternate ground for affirmance because the district court could have vacated the decree on its own motion. In that respect, the potential absence of Article III standing for Green himself to obtain affirmative injunctive relief against a party is immaterial.

Second, Respondents inaccurately report that the question was not presented below. The relevant portion of Petitioners' brief to the Eleventh Circuit on this issue is attached. App. 111a. Petitioners also referred to Rule 60(b)(5), and its standards throughout their Complaint-in-Intervention. App. 80a, 86a-87a, 89a, 90a, 92a-93a.

Third, Respondents urge that the conflict in the circuits is immaterial because a ruling in Petitioner Green's favor on this question cannot help him. *See* BIO at 24. Were this Court to conclude that the Eleventh Circuit was wrong not to accept the district court's obedience to the teaching of *Holder v. Hall*,

512 U.S. 874 (1994) and its progeny, *see* Pet. at 20, it is inconceivable that the appellate court would conclude the 1988 decree *must* continue to have prospective operation.

Fourth, in addition to the remedy of creating local government officials being outside the scope of the equity power of federal courts, Dillard lacked standing to perpetuate a decree like the Chilton County 1988 decree. Blacks are not sufficiently numerous or geographically concentrated in Chilton County to suffer vote dilution as a racial group. Pet. at 6-7; *Dillard v. Chilton County Bd. of Educ.*, 699 F. Supp. 870, 875-76 (M.D. Ala. 1988) (noting effect of small numbers on four person Commission structure). The Eleventh Circuit so ruled in another *Dillard* case, *Dillard v. Baldwin County Comm'n*, 376 F.3d 1260, 1267 (11th Cir. 2004). *But see*, Pet. App. 3a n.2.

Were there any doubt on that point, it could only arise from the possible outcome in *Bartlett v. Strickland*, No. 07-679, where the question presented is whether a vote dilution claim under § 2 of the Voting Rights Act can exist absent the ability of a minority group to comprise more than 50% of an election district. In Chilton County, it is not possible for a minority group to do so, and so there is no basis for Dillard to perpetuate the 1988 decree as a § 2 remedy. But the petition in the *Bartlett* case asserts a conflict on whether there can be vote dilution, or a remedy, under circumstances such as those which exist in Chilton County. Petitioners urge this Court to hold this Petition for resolution of the conceptually-connected review pending in *Bartlett v. Strickland*.

CONCLUSION

Based on the foregoing, Petitioners respectfully request that this Court issue a writ of certiorari to the Court of Appeals for the Eleventh Circuit.

Respectfully Submitted,

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IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE MIDDLE DISTRICT OF ALABAMA,
NORTHERN DIVISION

JOHN DILLARD, ET AL.,	)	
Plaintiffs,	)	
	)	
ROBERT R. BINION and	)	
JOHN	)	
WRIGHT,	)	
Plaintiff-Intervenors,	)	CIVIL ACTION NO.:
	)	87-CV-1179-MHT
	)	
v.	)	
CHILTON COUNTY	)	
COMMISSION,	)	
	)	
Defendants,	)	

JOINT MOTION TO AMEND CONSENT DECREE

Plaintiffs John Dillard et al. and plaintiff-intervenors Robert R. Binion and John Wright (hereafter "plaintiffs"), and defendant Chilton County Commission, through undersigned counsel, move the Court, pursuant to Rule 60(b)(5), Fed.R.Civ.P., to amend the consent decree approved by this

court June 23, 1988. As grounds for their motion, movants would show as follows:

1. Section 11-3-1(c), Code of Alabama, as amended by Act 2007-488. provides:

> Unless otherwise provided by local law, *by court order*, or governed by Section 11-80-12, and as otherwise provided in subsection (d), there shall be in every county a county commission, composed of the judge of probate, who shall serve as chairman, and four commissioners, who shall be elected at the time prescribed by law and shall hold office for four years until their successors are elected and qualified.

(Emphasis added.) Section 11-80-12, Code of Alabama, provides:

> Notwithstanding any other provision of law to the contrary, any board of education, county commission, or municipal governing body whose currently serving members have been elected by a method of election and a specific number of seats prescribed by a federal court shall retain that manner of election and composition until such time as the method of election or number of seats is changed in accordance with general or local law. This section shall not apply in any county where federal court has overturned the previous

> order concerning the manner of election and the number of members of a county commission and shall not apply in any county where there is currently pending litigation, or appeals relating thereto, challenging previous court orders or consent orders concerning the manner of elections or the number of members to districts of a county commission.

2. Alabama law thus provides authority for the number of seats and the method of electing the Chilton County Commission provided by the 1988 consent decree. But Alabama law does not provide specific authority for the provision in paragraph 4 of the 1988 consent decree requiring that a black person elected to the commission be given the opportunity to serve as chair. This proviso was intended to be a temporary measure to ensure equal opportunity for a commissioner who was the choice of black voters to serve as chair. It has never been invoked or exercised during the twenty years the consent decree has been in force and effect. The Parties agree that it is no longer equitable for the proviso

to have prospective application, and therefore agree that it should be stricken.

3. To ensure there is or will be state law authority for all provisions in the1988 consent decree and to facilitate final dismissal of this action, it is equitable and just to amend said decree by striking from paragraph 4 the following proviso:

> provided, however, that the procedures used by the commission for that purpose shall ensure that, if a black citizen is elected to the county commission, he or she shall be offered the opportunity to serve a term as chair of not less that [sic] six months duration during each four year tem of office. If more than one black citizen is elected to the commission, the proviso herein shall only require that one six month term as chair be guaranteed.

4. Undersigned counsel is authorized to represent that counsel for the defendant Chilton County Commission join in this motion.

WHEREFORE, the parties jointly request the Court, pursuant to its authority under Rule23(e), Fed.R.Civ.P., to

provide notice to members of the class of the proposed amendment of the 1988 consent decree, thereafter, to amend the consent decree by striking the foregoing proviso from paragraph 4.

Respectfully submitted this 4th day of March 2008.

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No. 06-14950-AA
No. 06-15354-AA

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

JOHN DILLARD, *etc., et al.,*

Plaintiffs/Appellants/ "Cross"-Appellees,

ROBERT R. BINION and JOHN WRIGHT,

Plaintiff-Intervenors/Appellants/ "Cross"-Appellees,

GILBERT GREEN and CALVIN JONES, JR.,

Plaintiff-Intervenors/Appellees/ "Cross"-Appellants,

v.

CHILTON COUNTY COMMISSION, PROBATE JUDGE ROBERT M. MARTIN, *etc.*

Defendants/Appellees/ "Cross"-Appellees.

On Appeal from the United States District Court for the Middle District of Alabama, No. 2:87-1179-T

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III. The District Court Was Obligated to Set Aside the 1988 Order by Green's Complaint, or Its Own Motion.

A. The District Court Satisfied the Standards of Rule 60(b)(5) in Relying on the Precedents of this Court Since the 1988 Order.

The district court did not fail to consider the standards of Rule 60(b), as claimed by Dillard. See DBW Br. at 34-37. As this Court explained, Rule 60(b)(5) authorizes relief when a prior judgment on which the decree is based has been reversed:

A consent decree is a judgment, and thus subject to Rule 60(b), which provides in part that a party may obtain relief from a final judgment if "the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application." Fed.R.Civ.P. 60(b)(5).

Johnson v. Florida, 348 F.3d 1334, 1341 (11th Cir. 2003). Under this standard, the district court's focus on the appellate precedents since the 1988 order is proper.

Here, not only did Green plead for relief under Rule 60(b)(5), but Green submitted an extensive Trial Brief and urged that the provisions of the 1988 order are no longer equitable in light of judicial rulings since 1988. (Doc. 150 at 18-35). Further, the transcript of oral argument on the written trial record in April 2005 made it clear that the district court understood it was operating under Rule 60(b). (Transcript (Apr. 26, 2006) at 23-26). The absence of a recital of Rule 60(b) hardly means that it was not the basis for relief.

Dillard complains that the district court did not apply the standards prescribed by *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367 (1992), and show a change in controlling law. *See* DBW Br. at 36, 38-41. But the district court honored this Court's precedent, *Ensley Branch, NAACP v. Siebels*, 31 F.3d 1548, 1578-79 (11th Cir. 1994), which finds the principles of *Rufo* not to warrant such a showing when the challenge is from a non-signatory. Common sense and fairness to non-parties call for such a rule. *See id.* at 1578 (rule minimizes independent actions).

Dillard also urges that the district court not be affirmed on the alternate ground that, regardless of Green's standing, it was empowered to act on its own motion. *See* DBW Br.at 36-37. Dillard claims deference to the local legislative judgments counsel such an approach, and points to the absence of state or local government seeking vacation of the 1988 order. Actually, the district court needs the power to act on its own motion precisely because government officials sometimes prefer judicial supervision to supervision from their constituents. *See Ensley Branch, NAACP*, 31 F.3d at 1574; *United States v. City of Miami*, 2 F.3d 1497, 1506-07 (11th Cir. 1993). That power is particularly important if local

officials and cosigners on their consent decrees insist on barring challenges from nonparties, or even if local officials feign indifference and allow others to delay action to comply with law.

Deference on this basis would be erroneous, as a matter of fact, too. In September 2003, the defendants admitted the allegations of the Complaint-in-Intervention filed by Green. (Doc. 75). In the Order on Pre-Trial Hearing, these local government officials requested that they not be subjected to conflicting orders from the court, but they do not deny Green's allegations. (Doc. 108 at 13). The current State legislative judgment favors a commission of four persons elected from single-member election districts, with the probate judge serving as chair *ex officio*. The 2003 act of the Alabama legislature had these provisions. Moreover, the 2006 legislature chose not to include Chilton County in a 2006 statute which ratified cumulative voting established by federal court orders, and not the subject of litigation.

Furthermore, in early 2004, the State of Alabama has advised that it believes the 1988 order should be vacated. Its posture in the Chilton County case, No. 87cv1179, has a tortured path. Originally, it was not a party. The State's position in early 2004 is set out in the Order on Pre-trial Hearing. (Doc. 108 at 13-14). In general, the State then viewed *Holder*, *Nipper* and *White* as likely barring change of size as a § 2 remedy. *Id.* at 14. At the direction of the court in late 2004, the State took more definite positions. It filed a Rule 60(b) motion, and sought to have the decree vacated. It asserted that the relief granted in 1988 should no longer have prospective effect, expressing more certainty about the effect of *Holder, Nipper* and *White*. The State also urged that the Alabama legislature's general intent to engage in racial discrimination is not the cause of any lack of political power

for blacks, as a racial group, in Chilton County. Rather, the cause is their small population. *Id.* at 3 (citing *Johnson v. DeSoto County*, 204 F.3d 1335 (11th Cir. 2000), and *Dillard v. Baldwin County Commission*, 222 F. Supp. 2d 1283 (M.D. Ala. 2002)). At the oral argument on the written trial record in April 2005, all the parties agreed that the State was not a party to the Chilton County action. The district court deemed its Rule 60(b) motion moot, and noted that the State was merely "interested." *See* Tr. at 35-41.

* * * *

CERTIFICATE OF SERVICE

I certify that I have on this 29th day of November 2006, served a copy of the foregoing Brief of Intervenor-Appellees/"Cross"-Appellants Gilbert Green and Calvin Jones, Jr. on all counsel of record by United States Mail, postage prepaid and addressed as follows:

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